IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

COMPLETE TITLE OF CASE

IN THE MATTER OF THE CARE AND TREATMENT OF JACK BROWN a/k/a GARY JONES,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

DOCKET NUMBER WD79594

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

DATE: March 28, 2017

APPEAL FROM

The Circuit Court of Jackson County, Missouri
The Honorable Kathleen A. Forsythe, Judge

JUDGES

Division Three: Mitchell, P.J., and Howard and Witt, JJ. CONCURRING.

ATTORNEYS

Chelsea R. Mitchell, Assistant Public Defender, Columbia, MO, Attorney for Appellant.

Joshua D. Hawley, Attorney General, Daniel N. McPherson, Assistant Attorney General, Jefferson City, MO, Attorneys for Respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

IN THE MATTER OF THE CARE AND TREATMENT OF JACK BROWN a/k/a GARY JONES,	)	
Appellant,	)	**OPINION FILED:**
v.	)	**March 28, 2017**
STATE OF MISSOURI,	)	
Respondent.	)	

WD79594 **Jackson County**

Before Division Three Judges: Karen King Mitchell, Presiding Judge, and Victor C. Howard and Gary D. Witt, Judges

Jack Brown appeals, following a jury trial, his civil commitment for control, care, and treatment as a sexually violent predator. Brown raises seven points on appeal. The first four challenge the constitutionality of various aspects of the Sexually Violent Predator Act (SVPA). Brown's fifth point argues that the court erred in permitting use of the term, "sexually violent predator," during trial. His sixth point challenges the court's ruling permitting both comment and testimony regarding the screening process for civil commitment under the SVPA. And his final point argues that the court plainly erred in admitting statements from the victim of a sexual assault allegedly committed by Brown in 1990. Finding no reversible error, we affirm.

AFFIRMED.

Division Three holds:

1. Article V, section 3 of the Missouri Constitution vests the Missouri Supreme Court with exclusive appellate jurisdiction in all cases involving the validity of a statute. But the Missouri Supreme Court's exclusive appellate jurisdiction is not invoked simply because a case involves a constitutional issue. To invoke the Court's exclusive jurisdiction, the constitutional issue must be real and substantial, not merely

colorable. When a party's claim is not real and substantial, but, instead, merely colorable, our review is proper.

2. In determining whether a constitutional claim is real and substantial or merely colorable, the reviewing court makes a preliminary inquiry as to whether the claim presents a contested matter of right that involves fair doubt and reasonable room for disagreement. If this initial inquiry shows that the claim is so legally or factually insubstantial as to be plainly without merit, the claim may be deemed merely colorable.

3. Here, each of the constitutional challenges Brown raises have been addressed by either the United States Supreme Court or the Missouri Supreme Court. Thus, they do not involve fair doubt or reasonable room for disagreement. Rather, they are merely colorable. Accordingly, we have jurisdiction over this appeal.

4. Although SVP proceedings involve a liberty interest, they are civil proceedings and not criminal matters.

5. Because the SVPA is civil, rather than criminal, it cannot constitute an ex post facto law. Additionally, initiation of its commitment proceedings does not constitute a second prosecution; thus, it does not violate the Double Jeopardy Clause, even though that confinement may follow a prison term. And, because confinement upon commitment does not constitute punishment, commitment cannot be deemed cruel or unusual punishment.

6. The SVPA is narrowly tailored to serve the compelling state interest of protecting the public from crime. This interest justifies the differential treatment of those persons adjudicated as sexually violent predators. Because the basis for commitment of sexually violent predators is different from general civil commitments, there is no requirement that sexually violent predators be afforded exactly the same rights as persons committed under the general civil standard. Accordingly, the SVPA does not violate equal protection by not requiring the least restrictive environment.

7. Though the statutory definitions of "mental abnormality" and "sexually violent predator" make no mention of "serious difficulty controlling behavior," the Missouri Supreme Court has interpreted the statutes to contain that requirement, and Brown's jury was instructed regarding the necessity of finding that Brown had "serious difficulty in controlling his behavior."

8. Use of the phrase "sexually violent predator" is allowable because the State's use of the phrase was in the context of arguing to the jury that the evidence proved that Brown is an SVP and it was not designed solely to inflame jurors against the defendant by associating him with heinous crimes not in the record. Rather, they were assertions wholly based on the evidence, which the State was required to prove under § 632.480.

9. Though it may constitute error for the State's attorney to discuss the SVP screening process, whether it constitutes error depends upon both the level of detail and the purpose for the discussion. Here, while the State's attorney did mention the screening process, it was only briefly and for the sole purpose of introducing one of the State's witnesses—the psychologist that performed the statutorily required end-of-confinement report—and not for the purpose of urging the jury to discard its independent duty to determine Brown's status and instead rely on prior determinations of those clothed in authority.

10. The general rule of law is that a party may not invite error and then complain on appeal that the error invited was in fact made. And a party who has introduced evidence pertaining to a particular issue may not object when the opposite party introduces related evidence intended to rebut or explain. This is true even though the evidence introduced to rebut or explain would have been inadmissible in the first instance.

11. Here, the evidence Brown complains of (detailed statements from an alleged prior victim) came into the case as a result of Brown's own questioning; thus, any error in their admission was invited.

12. To be admissible under § 490.065, an expert's testimony must be based upon facts or data that are reasonably relied on by experts in the field, and the facts or data on which the expert relies must be otherwise reasonably reliable. Any weakness in the factual underpinnings of the expert's opinion goes to the weight that testimony should be given and not its admissibility.

13. Here, Brown had the opportunity and did argue the weight of the 1990 victim's statements. There was no error in their admission.

Opinion by: Karen King Mitchell, Presiding Judge March 28, 2017

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